No. 06-766

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IN THE

# Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al*,

*Petitioners*,

v.

MARGARITA LÓPEZ TORRES, *et al*.,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## QUESTIONS PRESENTED

1. Whether a state election scheme that imposes severe burdens on voters and potential candidates is nevertheless exempt from strict constitutional scrutiny because one of its elements is a nominating convention.

2. Whether it was an abuse of discretion to enter a preliminary injunction temporarily precluding use of the state's unconstitutional election scheme until the case is tried on the merits or until the state legislature enacts a constitutional system.

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## STATEMENT

New York's constitution grants voters the authority to elect Supreme Court Justices (the state's trial judges of general jurisdiction). N.Y. Const. art. VI, § 6(c). By statute, New York mandates a "three-part scheme that combines a primary election, a nominating convention, and a general election." Pet. App. 10a (footnote omitted). The lower courts found that this scheme—enacted when Tammany Hall ran the New York Legislature—imposes severe burdens on voters and candidates. Local party leaders always hand-pick the nominees; voters have no realistic opportunity to influence their party's nomination; and insurgent candidates have no real opportunity to compete for the nomination. Moreover, because most parts of the State are dominated by a single party, these undemocratic nominations dictate the outcome of the general election in all but a few instances. As the Second Circuit put it, "New York has transformed a de jure election into a de facto appointment." *Id.* at 69a-70a.

As we show *infra*, several compelling reasons counsel against review of the Second Circuit's decision upholding a preliminary injunction that enjoined this scheme until trial. The case remains at an interlocutory stage. The district court "expressly contemplated a full trial at a later date," *id.* at 77a, and Petitioners "hotly contest" the relevant facts, Pet. 9. Events are also moving fast. It is likely that the state Legislature will replace the laws at issue before this Court could complete consideration of the case on the merits. Moreover, the issues presented—far from being matters of broad importance—concern an election system that is "unique in the nation." Pet. App. 9a. Finally, on the merits, the Petition relies on a caricature of the Second Circuit's opinion. No fair reading can support the Petition's hyperbolic arguments about clashes with this Court's precedents and conflicts with other circuits. Rather, the opinion faithfully applies the legal standards laid out by this Court and

carefully explains why the facts of this case are radically different from the facts at issue in the D.C. Circuit and Fourth Circuit cases cited by Petitioners.

### 1. The Facts Adduced at the Preliminary Injunction Hearing

The Petition discusses the statutory scheme as an abstraction. But the district court developed a 10,000-page preliminary injunction record establishing how the scheme actually functions, and the Second Circuit relied on the district court's extensive findings.

As the court of appeals put it: "This case requires us to peer inside New York's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people." *Id.* at 5a. The Second Circuit described a system "beset with obstacles" that "deprives a candidate of access altogether" through "overlapping and severe burdens." *Id.* at 17a, 45a. "[T]he evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention . . . ." *Id.* at 53a. In much of New York, the judicial nominating conventions operate in the manner of a proverbial "'smoke-filled room.'" *Id.* at 149a n.36. Absent a massive split within the party's leadership, not a single Democratic or Republican insurgent candidate has ever won nomination under this system. *Id.* at 58a, 147a, 167a. As the district court found:

> [L]ocal major party leaders—not the voters or the delegates to the judicial nominating conventions—control who becomes a Supreme Court Justice and when. The highly unusual processes by which that extremely important office is filled perpetuate that control, and deprive the voters of any meaningful role.

*Id.* at 95a.

At the preliminary injunction hearing, the district court received extensive evidence that local political party leaders control the election process. One report in evidence, authored by a Commission that included ten sitting or former New York judges, states: "'the uncontested evidence before [the Commission] is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.'" *Id.* at 29a. As the court of appeals observed,

> The Commission is hardly the only entity to reach this conclusion—it merely is the latest. Since 1944, New York's judicial nominating system has been described as exclusionary and boss-dominated; reports and newspaper editorials from that time forward have decried an electoral practice "that mocks choice," and criticized a system in which "voters can never know the candidates and have to accept party slates," while the "real choice is . . . left to political bosses . . . who control nominations."

*Id.*

Defendants' own witnesses confirmed this finding. For example:

- Defense expert Hechter wrote: "'The consequences of the New York judicial convention are well-appreciated. In politically unified districts it is difficult to attain the nomination without the support of the party leadership. *This high barrier to entry significantly narrows the pool of candidates.*'" *Id.* at 177a n.40 (emphasis added by the district court).

- Defense expert Kellner admitted that any attempt by a insurgent candidate to elect supportive convention delegates would "twist[] the design of the system on its head": "'The system isn't designed for individual candidates to be campaigning directly among the voters.'"

*Id.* at 168a-69a. He added: "'By definition, the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates.'" *Id.* at 19a.

- New York County Democratic Party leader Farrell, the executive officer of one of the defendants, acknowledged his power to stop *any* candidate whom he had not approved: "'I can surely block you.'" *Id.* at 133a. Defense witness Schiff confirmed: "I think I would know about it" if someone were nominated over Mr. Farrell's objection, and "I can't remember it ever happening that way." Tr. 1291-92; Pet. App. 21a.

These admissions confirmed a wealth of detailed evidence about each step in New York's byzantine statutory nomination system.

**a. Recruiting and Qualifying Delegates.** New York's Supreme Court Justice elections ostensibly begin with a primary. Voters elect delegates to separate judicial nominating conventions in each of New York's 12 Judicial Districts. Within each Judicial District, candidates for the office of "judicial delegate" run in each of the much smaller Assembly Districts ("ADs"). As the district court put it:

> This odd feature of the judicial nominating convention process contributes significantly to the heavy burden it places on those who seek major party nominations for Supreme Court Justice without the support of the party's district leaders and county leaders. Such candidates face the prospect of as many delegate races as there are ADs in the judicial district—at least nine and as many as 24.

*Id.* at 104a. Adding to this burden, the political parties, which are authorized by statute to set the number of delegates, require the election of multiple delegates in each AD, amounting to

scores of candidates in each Judicial District. *Id.* at 11a-12a, 104a-07a.

Therefore, the first problem any insurgent faces is recruiting enough candidates to contest scores of delegate and alternate races in each of the district's many ADs. That problem is insuperable in practice, as all but one of Petitioners conceded at the preliminary injunction stage. *Id.* at 168a. Indeed, Petitioners' expert testified that it would be *improper* for a candidate to run a slate of delegates, because "[t]he system is designed for candidates to be appealing to the judicial delegates and not to the electorate at large." Tr. 1573.

Even if a candidate could recruit enough people willing to run for delegate and alternate, it would be practically impossible to put all those willing individuals on the ballot. For each prospective delegate or alternate candidate, the candidate would have to gather 500 valid signatures of party members residing in the specific AD. N.Y. Elec. Law § 6-136(2)(i), (3). As a result, the number of signatures required just to run a slate of delegates and alternates across a single Judicial District is several times larger than the number required to get onto the primary ballot for other judicial and non-judicial offices covering the same territory and rivals the number required to run for Governor *statewide*. Moreover, that comparison ignores the added statutory burden of obtaining signatures in *each* of the ADs in the Judicial District. Pet. App. 12a. In addition, to protect against legal challenges by the county's party machine, an insurgent candidate would need to gather many more than the statutory minimum of 500 signatures in each AD. *Id.* at 13a, 108a.

Those few candidates who have tried to run alternate slates of delegates have not come close to success. For example, one City Court Judge in Rochester "found that recruiting and running slates of delegates was 'not a realistic option.'" *Id.* at 14a. Competing would have required him to recruit more than 55

candidates for delegate. *Id.* Moreover, "the signature requirements were daunting: he would have had to recruit 'several dozen people to work full-time at gathering' at least 9,000 signatures over the course of 37 days." *Id.* The candidate concluded that "'there was simply no way [he] could overcome these organizational and financial burdens.'" *Id.* at 15a.

Judge Margarita López Torres, one of the plaintiffs, tried to obtain the nomination of her party for eight years. She "was an experienced and successful campaigner who twice won countywide election to the Civil Court in Brooklyn." *Id.* But she, too, found that the "'burdens and barriers to organizing such [delegate] campaigns are truly insurmountable' for those candidates who lack the 'county party leaders' backing." *Id.*

By contrast, party leaders easily tap party loyalists to run as delegates and alternates. "Most delegates have strong ties to the district leaders who select them, and sometimes work for them as well." *Id.* at 114a. As defense expert Hechter admitted, "'District leaders effectively select delegates to the judicial convention.'" *Id.* at 177a n.40. Defense expert Kellner agreed that local politicians select judicial delegates "at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table, say who do we run?" Tr. 1624. Moreover, those leaders have no difficulty putting their hand-picked choices onto the ballot in every AD. An enormous hurdle for a challenger is a *pro forma* exercise for the party leaders, who "can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices." Pet. App. 109a; *see also id.* at 16a-17a.

**b. Electing Delegates.** Delegates run for the sole purpose of attending a single judicial convention. Two weeks after the election, the job is over. If, as occurs almost all the time, the party leadership slates of delegates and alternates are the

only ones filed with the Board of Elections, they are "deemed . . . elected" and do not even appear on the September ballot at all. N.Y. Elec. Law § 6-160(2). "This kind of invisible, automatic 'election' is the norm rather than the exception." Pet. App. 17a.[1]

Even in the rare contested delegate and alternate races, the September ballot does not and cannot tell voters which Supreme Court candidate the nominees intend to support—in contrast with the ballot in Presidential primaries, which shows the voter both the delegate and the Presidential candidate together. As a result, an insurgent candidate would have to inform the voters of a particular delegate's or slate's allegiance through expensive campaign advertising or contacts with voters—with each AD requiring separate literature identifying the relevant delegate candidates and the Supreme Court candidate. *Id.* at 13a.

A candidate who recruited enough nominees for all the delegate and alternate seats in every AD, *and* obtained the necessary signatures, *and* survived legal challenges to their petitions, would *still* face the formidable obstacle of actually getting the insurgent slate elected. A candidate

> would need to field delegates in all or virtually all the ADs to have a realistic chance of prevailing in enough races to obtain a majority of delegate support at the convention. This is true not only because a challenger candidate is not likely to win every delegate race under normal circumstances, but also because the prospect of competing against the party leaders elevates the degree of difficulty.

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[1] The rare exceptions "are almost always the result of localized disputes between entrenched factions of the party, not of challenger candidates' efforts to obtain support of party members." Pet. App. 112a.

Pet. App. 107a; *see also id.* at 63a.

**c. "Lobbying" the Party Leaders' Chosen Delegates.** Insurgents have the theoretical option of "lobbying" the convention delegates. But once the delegates have been duly installed in early September, New York law requires the nominating convention to be held within two weeks. N.Y. Elec. Law § 6-124. That is an impossibly short period in which to persuade scores of delegates to defy the leaders who gave them their positions. Pet. App. 18a, 116a. But even if it were two months, or two years, party leaders' control over the delegates and the convention would thwart any insurgent.

New York's judicial nominating conventions are *pro forma* affairs at which the delegates "rubber stamp" decisions made earlier. *Id.* at 22a-23a, 114a, 125a-26a. Petitioners' expert admitted: "'Party leaders have great influence over the nomination process when their party is unified. Indeed, judicial conventions generally take little time. Decisions are often unanimous. Since insurgent candidates are only likely to be nominated when the party is internally divided, rates of incumbency are high.'" *Id.* at 177a n.40. Defense expert Kellner "conceded that at least in some judicial districts, the 'leadership of the party . . . hold[s] a meeting before the convention' to 'work things out,' and then makes nomination 'recommendations' to the delegates. Asked whether those 'recommendations' were 'always followed,' Kellner replied, 'Generally, yes.'" *Id.* at 21a.

The district court credited "in its entirety" the testimony of plaintiffs' expert Henry Berger. *Id.* at 117a. Mr. Berger, former Chairman of New York's Commission on Judicial Conduct, explained:

> "[T]he district leaders almost always follow the wishes of the county party [leader] when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who

> have selected them and support the county party [leader's] chosen candidates."

*Id.* at 19a. Mr. Berger also testified that "the pool of truly eligible candidates is severely limited and cannot include many talented lawyers who have spent their careers focusing on legal work rather than political party service." JA-296.

Expert Bruce Cain testified that "[t]he whole process lacks that democratic moment [in] which the voters get to say whether or not they believe the party's organization is doing the right thing. It is just not there in the process." Tr. 329. The district court credited Dr. Cain's conclusion, finding "no evidence of a single successful challenge to candidates backed by the party leaders." Pet. App. 131a-32a.

Compelling documentary evidence confirmed the experts' conclusions. More than 96% of nominations have been uncontested at the convention. *Id.* at 22a. The district court also credited evidence of the compressed time devoted to the conventions, *see id.* at 126a-29a, and the high absentee rates for judicial delegates, which range from 25% for Democratic Party conventions in New York City to 69% for Republican Party conventions in New York City, *see id.* at 23a, 104a n.8. The district court explained that "[t]he extremely high absentee rate reflects, among other things, the fact that delegates to the conventions know their votes do not really matter." *Id.* at 125a.

The futility of "lobbying" is well illustrated by the experience of Judge López Torres. As the district court explained: "Shortly after she was elected [to the Civil Court]...she was told by [Clarence] Norman, the county leader, and Vito Lopez, her district leader, to hire a particular young attorney as her court attorney.[2]... When López Torres refused, Norman told

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[2] The "court attorney," or "law secretary," is the state-court analog to a federal judge's law clerk. Pet. App. 24a.

her she would not become a Supreme Court Justice." *Id.* at 137a-38a; *see also id.* at 24a-25a. Mr. Lopez later offered Judge López Torres "a chance to redeem herself: if she hired his daughter as her law secretary, he would secure her nomination as the Democratic Party's candidate for Supreme Court Justice." *Id.* at 25a. Again, she refused. When Mr. Norman later blocked Judge López Torres from obtaining the nomination, he said that "his concerns with her candidacy had nothing to do with her qualifications," but rather arose out of her "disloyalty." *Id.* at 140a, 27a.

State Senator (and witness for the defense) Martin Connor acted as chair of the 2002 nominating convention in Brooklyn. He admitted that a "County" operative routinely told him in advance who the nominees were to be. Tr. 2204, 2208-09. Consistent with that routine, on the day before the 2002 convention, he learned that the party leaders had chosen a candidate he considered unqualified. "I said you have Margarita López Torres, she might put her name in. You people are supporting . . . a horrible choice." *Id.* at 2208-09; *see also* Pet. App. 22a, 114a-15a. Despite his personal outrage and conviction that "what was about to be done was wrong, and bad for the bench," Senator Connor kept quiet at the convention. *Id.* at 115a.

Similarly, after the 2003 convention a year later, a "County" operative circulated a letter to all delegates telling them that he had voted against Judge López Torres at the convention because she was an "ingrate" for refusing to hire Vito Lopez's daughter. *Id.* at 28a, 142a.

If a powerful and respected politician like Senator Connor felt obliged to keep quiet while "County" punished Judge López Torres, "it is hardly likely that mere delegates will refuse to do the county leader's bidding in the ordinary course of events." *Id.* at 115a. The district court recognized this as evidence of the "political dynamic [that] ensures that the district

leaders and their delegates . . . virtually always support the candidates backed by the party leaders." *Id.* at 114a.

**d. The General Election.** "Empirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." *Id.* at 23a. Even Petitioners' expert admitted that "there are relatively few judicial districts where there are contested general elections." Tr. 1601.

**2. The Preliminary Injunction**

Following a four-week evidentiary hearing on Plaintiffs' motion for a preliminary injunction, the district court concluded that Plaintiffs had "made a compelling showing that the New York system is designed to freeze the political status quo," Pet. App. 183a, had shown a substantial likelihood of success on the merits, *id.* at 185a, and had met the other requirements for a preliminary injunction.

In fashioning its preliminary injunction, the district court noted that "[t]he choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State." *Id.* at 183a. The court therefore awarded a temporary remedy, lasting only until trial, or until the legislature enacts a constitutional method of nominating Supreme Court Justices. *Id.* The court severed the unconstitutional system and left in place the default statutory framework that otherwise governs all judicial and non-judicial elections in New York. The court determined that this approach, which would result in a direct primary election under New York's default provision (N.Y. Elec. L. § 6-110) until the State enacts a constitutional statute, was "the least intrusive course." Pet. App. 184a. Defendants never proposed to the district court *any* alternate remedy.

### 3. The Interlocutory Appeal

A unanimous panel of the Second Circuit affirmed. The court conducted a thorough review of the facts found by the district court after the preliminary injunction hearing, approving them entirely. The court began its legal analysis by recognizing that the right to vote is "'of the most fundamental significance,'" that "'the rights of voters and the rights of candidates do not lend themselves to neat separation,'" and that "'[o]ur primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose.'" *Id.* at 35a (following and quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), and *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

At the same time, the Second Circuit recognized that "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Anderson*, 460 U.S. at 788). Thus, the court refused to "resort to any 'litmus-paper test that will separate valid from invalid restrictions,'" and explained that "our review is neither formalistic nor abstract. Instead, we must turn a keen eye on how the electoral scheme functions in fact; indeed, 'it is essential to examine in a realistic light the extent and nature of [the scheme's] impact on voters.'" *Id.* at 35a-36a (quoting, respectively, *Anderson*, 460 U.S. at 789, and *Bullock v. Carter*, 405 U.S. 134 (1972)).

The court of appeals then articulated this Court's flexible standard for assessing ballot access restrictions:

> If our realistic assessment yields the conclusion that the electoral scheme lightly or even moderately burdens First Amendment rights, we apply a relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest.

> On the other hand, if we conclude that a law imposes severe burdens, we apply strict scrutiny, which requires that the law be necessary to serve a compelling state interest.

*Id.* at 36a (following *Bullock*).

Next, the Second Circuit explained that "the state must protect First Amendment rights at each 'integral part of the procedure of choice.'" *Id.* at 38a (quoting *United States v. Classic*, 313 U.S. 299, 318 (1941)). It rejected Petitioners' contention that *Classic* and its progeny apply "only where the state has provided for a *direct* primary, whereas New York has opted for an *indirect* delegate primary election followed by a convention." *Id.* at 39a. "This variation in the process of public choice," the court held, "does not release the State from its First Amendment obligations." *Id.*

The court of appeals then explained that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest," and that "exclusions that result from a complex of otherwise facially valid regulations also may offend the First Amendment." *Id.* at 41a-42a. The court added: "Although no case has passed on a scheme identical to New York's unique judicial election process, the above principles derive directly from a line of Supreme Court cases." *Id.* at 42a; *see also id.* at 42a-44a (following *Anderson*, 460 U.S. 780; *Am. Party of Tex. v. White*, 415 U.S. 767 (1974); *Bullock*, 405 U.S. 134; *Jenness v. Fortson*, 403 U.S. 431 (1971); and *Williams*, 393 U.S. 23)).

Petitioners attempted to avoid strict scrutiny on two grounds. *First*, they took issue with the district court's findings of fact. The Second Circuit, however, embraced those findings. *Id.* at 10a. The question whether the burden was "severe" was not close: the New York scheme "does not merely deprive a

candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether." *Id.* at 45a. The court assessed these burdens in light of the extensive record developed below, *id.* at 61a-70a, including statistical, documentary, and testimonial evidence from many witnesses in addition to that of the lead plaintiff—a qualified and diligent candidate whom many voters within her party wished to support: "when López Torres was an incumbent Democratic office holder seeking a Supreme Court nomination, she had significant public support, but could not access the electoral process without possessing either great wealth or a massively preexisting political apparatus." *Id.* at 59a. Petitioners attacked this facet of the court's fact-based inquiry as lacking legal support. But the Second Circuit easily rejected that complaint, relying on *Storer v. Brown*, 415 U.S. 724 (1974), as well as its own precedent. Pet. App. 60a. It found the distinction between the independent candidate in *Storer* and the challenger candidate here to be immaterial, because "[m]inor party candidates and disfavored major-party candidates face closely similar challenges in this context: both are opposing an entrenched, dominant, and hostile political apparatus." Pet. App. 60a.

*Second*, Petitioners argued that "a nominating convention is per se constitutional," *id.* at 46a, relying for this novel argument on a snippet from this Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974). The Second Circuit rejected that interpretation of *White* for several reasons, including the fact that this Court actually applied strict scrutiny to the statute there at issue. Pet. App. 47a-48a. The court of appeals also deemed inapposite two cases cited by Petitioners that involved challenges to internal party rules relating to the presidential convention system, because those rules imposed minimal burdens on the franchise and were not mandated by law. *Id.* at 49a-54a.

The Second Circuit then considered and rejected as insufficient each of the State's proffered justifications for the burdens imposed by its election system, applying strict scrutiny. *Id.* at 70a-76a. Petitioners have not taken issue with that aspect of the ruling below. Finally, the Second Circuit found no abuse of discretion in the district court's temporary remedy. *Id.* at 78a-84a.

## REASONS FOR DENYING THE WRIT

Petitioners attempt to portray the Second Circuit's application of this Court's precedents to New York's unique statutory scheme as a rogue decision that will have broad implications for constitutional doctrine and for other state statutes. In truth, however, the fact-bound ruling of the court of appeals addresses a statutory scheme that has no analog anywhere in the country. Any decision by this Court in this case would thus have no direct application to *any* other state's election laws.

Moreover, other factors make this case procedurally unsuitable for review. The Petition seeks review of an interlocutory order, even though the lower court "expressly contemplated" a later trial. *Id.* at 77a. Petitioners also disregard the New York Legislature's express commitment to address "expeditiously" the constitutional infirmities identified by the lower courts. *Id.* at 84a. The State's new Governor pledged during his recent campaign to reform what he called "a party-dominated system of judicial selection that permits unqualified judges to reach the bench." Eliot Spitzer, Address to the Rockefeller Institute of Government: Government Reform (Nov. 21, 2006). Accordingly, it is very likely that the statutory scheme at issue will be changed even before this Court could reach the merits.

Nor is there any reason to doubt the validity of the Second Circuit's legal analysis. Far from running afoul of this Court's opinions in *Storer* or *White*, the court faithfully applied those precedents—and the closely related cases that Petitioners do not

mention. Moreover, in part because New York's statutory scheme is unique, the suggestion that the decision conflicts with rulings of two other circuits—involving internal party rules rather than mandatory statutes, and burdens that were anything but severe—does not withstand scrutiny.

## I. THE NOMINATION SCHEME IN THIS CASE IS UNIQUE, AND THE SECOND CIRCUIT'S DECISION IS FACT-BOUND.

A decision by this Court would be relevant only to New York's "unique hybrid scheme" for nominating Supreme Court justices. *Id.* at 47a. Of the 33 states that use contestable elections to select some or all of their trial judges, New York is the only state that uses a convention system at all, let alone the hybrid scheme at issue. *Id.* at 97a-98a. In addition, the scheme is unique to the office of Supreme Court Justice *within* New York. Candidates for every other elective office in New York—judicial and non-judicial—run in ordinary primary elections. *Id.* at 98a. The Petition identifies no electoral system elsewhere that would be even remotely affected by a ruling on the merits. Indeed, Petitioners' failure to identify any real conflict between the Second Circuit's decision and either this Court's or other circuits' precedents owes to the indisputable fact that New York's arcane system has no analog in the current statutory nomination systems in other states.

For the same reason, this case would be a peculiarly inappropriate vehicle to address any broader questions of First Amendment doctrine. In general, this Court will "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981).

The Second Circuit's decision turned on an analysis of New York law and evidence of the severe burdens it imposes on candidates and voters. Pet. App. 5a, 95a. Although Petitioners

"hotly contest" the facts, Pet. 9, they offer no reason why it would be a wise allocation of this Court's resources to umpire such a contest. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

## II. THE CASE IS PROCEDURALLY UNSUITABLE FOR REVIEW.

Review by the Court at this juncture would be premature, as both the factual record for the lower courts' interlocutory decisions and the very statutory scheme at issue may change.

The district court adopted a "temporary remedy," and "expressly contemplated a full trial at a later date." Pet. App. 77a. For that reason alone, review by this Court would be premature at best. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of *certiorari*). As this Court has said, "except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

Moreover, the Legislature and the Governor have indicated that they intend to alter the statutes at issue. Within "weeks after the district court issued its decision, New York's State Senate passed a bill providing for primary elections for the office of Supreme Court Justice," Pet. App. 83a, and the Senate sponsor just reintroduced the same bill on January 4, 2007, S. 564. In a brief filed with the Second Circuit, the Legislature pledged to "'move as expeditiously as necessary to devise a workable solution'" in the event the Second Circuit affirmed. Pet. App. 84a. And the State's new Governor has stated: "It is a simple fact that our court system is in dire need of reform.... [T]he courts have been hopelessly compromised by a party-dominated system of judicial selection that permits unqualified judges to reach the bench." Eliot Spitzer, Address to the Rock-

efeller Institute of Government: Government Reform (Nov. 21, 2006). More recently, he said that "there must be a way to primary onto the ballot. I will not support anything that has a closed convention structure, where only those who came out of the convention could be on the ballot." John Caher, *Spitzer Calls for Court and Election Reforms*, N.Y. L.J. 1, 12 (Jan. 4, 2007).[3]

## III. THE SECOND CIRCUIT CORRECTLY APPLIED *STORER V. BROWN* AND SIMILAR BALLOT ACCESS CASES.

Petitioners work hard to concoct a tension between the Second Circuit's decision and *Storer v. Brown*, 415 U.S. 724 (1974). But the Second Circuit's application of *Storer* to New York's hybrid convention system was entirely proper and unremarkable. The court of appeals simply used the standard articulated and applied by this Court to *all* ballot access cases for more than 40 years, and that test is perfectly adequate to guide the lower courts.

### A. The Unitary Standard Governing Ballot Access Cases Applies To Intra-Party Nomination Processes.

Petitioners challenge the Second Circuit's reliance on "the *Storer* line of cases," insisting that those cases addressed only

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[3] Review by this Court is particularly inappropriate given that a full range of potential reforms is being publicly debated. The Legislature has recently held hearings across the State to address the future of the Supreme Court selection system. Not surprisingly, there is great variety in the remedies that have been proposed. The remedies proposed range from an appointive system, to primaries (as exist for every other election in New York), to major and minor changes to the convention system. Strikingly, the system as it existed prior to the district court's decision was almost universally criticized in the hearings for what the President of the New York State Bar Association called its "undemocratic" and "sham" (as well as "unconstitutional") form.

minor party or independent candidate access to general election ballots, rather than "intraparty competition" at the nomination phase. But the ballot access cases that undergird the Second Circuit's decision are part of a single line of cases in which this Court has applied a consistent approach to analyzing barriers to participation in the political process—strict scrutiny for "severe" burdens; rational-basis scrutiny for "lesser" burdens—whether at the nomination or general election stage, and irrespective of whether the plaintiffs are major-party, minor-party, or independent candidates.

Beginning with the White Primary Cases, this Court established the principle that the voters' "right of participation" is fully applicable at the intra-party nomination phase and must be "protected just as is the right to vote at the election." *United States v. Classic*, 313 U.S. 299, 318-19 (1941); *Smith v. Allwright*, 321 U.S. 649, 653 & n.6, 663-64 (1944) (Democratic Party primary); *Terry v. Adams*, 345 U.S. 461, 469-71 (1953) (pre-primary election by private club). In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966), this Court relied on these cases in striking down a poll tax, explaining that any substantial infringement on the fundamental right to vote "must be carefully and meticulously scrutinized." (quotation marks omitted).

In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio law that "heavily burdened" the ability of new political parties to place electors on the presidential ballot. *Id.* at 31. Following *Harper*, and resting its decision on both the First and Fourteenth Amendments, the Court applied strict scrutiny to strike down the statute because the State "failed to show any 'compelling interest' which justified imposing such heavy burdens on the right to vote and to associate." *Id.*

In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Court used the same standard to evaluate an Illinois statute that burdened independent candidates. Following *Classic* and *Allwright*, the

Court applied strict scrutiny to severe burdens on the right to vote, expressly applying the same level of scrutiny as in cases of invidious discrimination: "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination *or of abridgment of the right to vote*." 394 U.S. at 818 (emphasis supplied).

In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court struck down a Texas law that placed severe burdens on candidates in the Democratic Party primary election. The Court applied "close scrutiny" because the "patently exclusionary character" of the filing fee requirement "in every practical sense precluded" certain candidates "from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Id.* at 143.

And in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court applied the same standard to strike down an Illinois statutory restriction on voters' freedom to participate in their parties' nomination that "deprived [the voter] of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." *Id.* at 58. The Court added: "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Id.*

Then, in three cases announced together on March 26, 1974—*Storer*, *Lubin v. Panish*, 415 U.S. 709 (1974), and *White*—the Court applied this same standard: severe burdens on the right to vote in any context require strict scrutiny, while lesser burdens permit rational-basis review. Each of the cases cited one or both of the others; all three cases cited and followed *Williams* and *Bullock*. In *Storer*, this Court applied the test to independent candidates, affirming some restrictions as both legitimate and compelling, 415 U.S. at 736, and remand-

ing for further consideration of the "extent of the burden" imposed by other restrictions, *id.* at 740. In *Lubin*, this Court applied the same test to strike down California's filing fees for all party candidates in that state's primary elections. *Lubin* found that the right to vote is "'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." 415 U.S. at 716 (quoting *Williams*, 393 U.S. at 31). Finally, in *White*, the Court applied strict scrutiny to restrictions on the nominating procedures available to minor parties, holding that the restrictions' "validity depends upon whether they are necessary to further compelling state interests." 415 U.S. at 780 (citing *Storer*).

Petitioners thus are wrong to insist that *Storer* is part of a separate "strand" of jurisprudence. This Court has applied the identical First and Fourteenth Amendment standard to restrictions on independent or minor-party candidate access to the general election ballot (*e.g.*, *Storer*, *Williams*) and restrictions on intra-party nomination procedures for major and minor parties (*e.g.*, *White*, *Kusper*, *Bullock*, *Lubin*).[4] Later cases use the same test. *See Clingman v. Beaver*, 544 U.S. 581, 586-87, 589 (2005) (determining that burdens imposed by restrictions applicable to both major and minor parties during nomination phase were not severe); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14, 216 & n.7 (1986) (applying strict scrutiny where state imposed severe burdens on major-party nominations); *Anderson v. Celebrezze*, 460 U.S. 780, 789-96 (1983)

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[4] Petitioners attempt in a footnote to cabin *Lubin* and *Bullock* as cases involving invidious discrimination decided on Fourteenth Amendment grounds. Pet. 19 n.2. But these cases did not address discrimination against a protected class at all. They rested on associational rights protected by the First *and* Fourteenth Amendments. *See Lubin*, 415 U.S. at 710, 716; *Williams*, 393 U.S. at 30-31; *see also Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.6 (1983).

(applying strict scrutiny to restrictions on independent candidates). The Petition does not cite a single case limiting the analysis in *Storer* to independent candidates.[5] Indeed, as the Second Circuit pointed out, the burdens on a party insurgent closely parallel those on an independent candidate: "both are opposing an entrenched, dominant, and hostile political apparatus." Pet. App. 60a.

### B. THE SECOND CIRCUIT'S DECISION DOES NOT "COLLIDE" WITH STORER.

Petitioners assert that the Second Circuit's decision "collides" with *Storer* by creating a constitutional "right to win." Pet. 22. But the court of appeals specifically disclaimed any constitutional "right to win," Pet. App. 45a, holding rather that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest," *id.* at 41a-42a. The Second Circuit affirmed the district court not because insurgent candidates cannot "win," but rather because "New York's nominating process, as found by the District Court... deprives a candidate of access altogether." Pet. App. 45a. Among other evidence, the Second Circuit properly considered proof that not a single insurgent candidate had *ever* obtained a major party nomination for Supreme Court. *See Norman v. Reed*, 502 U.S. 279, 294 (1992) (relying in part on extent of past successes in overcoming alleged burdens to determine their severity).

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[5] Lower courts have uniformly applied *Storer* in cases not involving independent candidacies. *See Bowe v. Board of Election Commr's*, 614 F.2d 1147, 1152, 1153 n.10 (7th Cir. 1980); *Ulrich v. Mane*, 383 F. Supp. 2d 405, 412 (E.D.N.Y. 2005); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 178 (D. Conn. 2003); *Molinari v. Powers*, 82 F. Supp. 2d 57, 70-71 (E.D.N.Y. 2000).

Petitioners also contend that "the proper equivalent to ballot access is convention access, *i.e.*, having a chance to put one's name up for consideration at the convention." Pet. 23 (emphasis omitted). That contention is contrary to the evidence, which showed that "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." Pet. App. 18a. For a challenger candidate, "access" to the closed convention bears no resemblance to the opportunity to compete for support among the party's voters free of unnecessary and severe burdens; for the party's voters, "access" to the convention not only never occurs, but would, in the words of Petitioners' expert, "twist the design of the system on its head." *Id.* at 17a. That is because "the process of lobbying delegates imposes severe, exclusionary burdens on candidates and voters," *id.* at 64a, and the conventions merely "rubber stamp" the will of the party leadership without consultation or deliberation, *id.* at 45a, 125a-26a. The Second Circuit thus found that mere formal "access" to the conventions to request the nomination does not address the legally relevant problem, namely that "candidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." *Id.* at 45a.

This Court evaluates "the realities" of ballot restrictions, not "empty formalism."[6] The Court's precedents fully support the Second Circuit's insistence on actual, rather than theoretical, voter participation at the nomination phase. As the Court stated in *Classic*:

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[6] *See Clingman*, 544 U.S. at 610 (Stevens, J., dissenting); *id.* at 599 (O'Connor, J., concurring) ("A realistic assessment...require[s] examination of the cumulative effects of the State's overall scheme."); *Tashjian*, 479 U.S. at 234 (Scalia, J., dissenting) (this subject matter "does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case").

> [W]e cannot close our eyes to the fact . . . that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice.

313 U.S. at 319; *see Kusper*, 414 U.S. at 58 ("A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process."); *Bullock*, 405 U.S. at 146-47 (rejecting formal access to general election ballot as a "reasonable" alternative to opportunity to compete at primary election); *Clingman*, 544 U.S. at 590 ("'[t]he moment of choosing the party's nominee'... is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'") (Thomas, J., for a plurality) (internal citations omitted).

This Court has further held that the voters' right to participate at the nomination stage is particularly significant where the party's nomination "effectively controls the choice," *Classic*, 313 U.S. at 318, or "may be more crucial than the general election." *Bullock*, 405 U.S. at 146-47. Here, the "[e]mpirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 23a.

## IV. THE SECOND CIRCUIT'S DECISION DOES NOT "CLASH" WITH *WHITE*

Petitioners ignore the fact that *White* is of a piece with the other ballot access cases, and instead rely exclusively on a one-line quotation from *White* to argue that a state may "insist that intraparty competition be settled before the general election by primary election or by party convention." *White*, 415 U.S. at

781. But *White* did not address whether conventions are *per se* constitutional; that question was "not contested." *Id.*

The central question in *White* was whether the burdens imposed by a statute that required minor parties to demonstrate the support of 1% of the electorate (either through a series of conventions or through post-convention signature gathering) was "necessary to further [a] compelling state interest." 415 U.S. at 780; *see id.* at 782-83 & n.14. The Court simply did not address whether the particular convention procedures used in Texas provided members of a party with a sufficient role in the nomination process, much less suggest that *all* conventions would pass muster without regard to the traditional legal standard of review.

Further, the convention system addressed in *White* bears no resemblance to New York's uniquely burdensome and closed hybrid system. Texas's system involved precinct conventions at which any registered voter in the precinct could vote directly for the candidate of his or her choice. 415 U.S. at 784 ("Any voter, however registered, may attend the new party's precinct convention . . . .").

The fact that New York has chosen a hybrid system rather than a primary does not eliminate the candidates' and voters' right to participate free of severe and unnecessary burdens. Otherwise, the First Amendment would limit the ability of a state to burden the right to vote in a primary, but would not apply at all where a state adopts a nomination mechanism that grants a handful of party leaders in a smoke-filled room the unbridled power to choose the party's standard-bearers without *any* voters' input at all. That cannot be the law. "To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all party members except those kept out by the [restriction]. Each is an 'integral part of

the election machinery.'" *Morse v. Republican Party of Va.*, 517 U.S. 186, 207 (1996) (quoting *Classic*, 313 U.S. at 318).

The Petition suggests that the Second Circuit prohibited the use of conventions. That is not true. The Second Circuit expressly left open the possibility that New York could enact a nominating system that would include a convention of some kind—as long as the system viewed as a whole does not impose the unnecessary and severe burdens that are hallmarks of the current system. Pet. App. 82a-83a. In fact, the State already uses several convention systems for non-judicial offices that do not impose unconstitutionally severe burdens. For example, the State's major parties hold conventions to select their designees for statewide offices; challenger candidates for those offices must gather petitions to obtain a place on the party's primary ballot if they do not succeed at the convention. *See* N.Y. Elec. Law §§ 6-124, 6-126, and 6-158. New York's small towns and villages hold conventions in which *any* resident party member may attend caucuses to nominate candidates for local offices. *Id.* §§ 6-108, 6-202, and 15-108.

The Petition also claims that the lower courts "dismantled New York's chosen election method and replaced it with a primary." Pet. 16. That is silly. The courts temporarily enjoined the operation of the two offending sections of New York's election law, and clarified that the *existing* default provision (§ 6-110) would govern until trial, unless the Legislature sooner chose to enact a system that would survive constitutional scrutiny. Pet. App. 82a-83a. Far from "imposing" a primary, the Second Circuit merely affirmed the district court's deference to the statutory default.[7]

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[7] The Second Circuit also properly rejected petitioners' argument that the district court should have crafted its own version of a judicial convention rather than eliminating the offending statutory provisions. Such tinkering would have required the trial judge "to act as a one-person legislative super-

*Footnote continued on next page*

Not a single case—and certainly not *White*—has even considered, much less upheld, a convention system anything like New York's uniquely burdensome system. The "clash" Petitioners allege between *White* and this case is entirely fictitious and offers no reason to grant review.

## V. THERE IS NO CIRCUIT SPLIT.

In an effort to manufacture a basis for a grant of review by claiming a circuit conflict, Petitioners mischaracterize the holdings of *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), and *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987). Neither case announced or applied legal principles at odds with the Second Circuit.

In *Bachur*, the plaintiff challenged the Democratic National Party's rule requiring each state to send equal numbers of male and female delegates to the party's national convention. *Bachur*, 836 F.2d at 838. The court observed that the plaintiff's "vote for delegates is some steps removed from a vote for an actual candidate for public office" and deemed the restriction to be "limited" rather than severe. *Id.* at 841 (following *Anderson*, *Bullock*, and *Tashjian*). The Court therefore considered whether the restriction had a "rational purpose." *Id.* at 842. The Court emphasized that it was not announcing a *per se* rule: "We do not foreclose the possibility of a different result with respect to a different restriction in a different case." *Id.* at 841. The Second Circuit correctly distinguished *Bachur*, explaining: "In that case, there existed no entry barriers to candidates. Nor did the regulations effectively prevent a party member from voting for their preferred candidate...." Pet. App. 53a.

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*Footnote continued from previous page*
chamber—precisely what is forbidden." Pet. App. 80a

In *Ripon*, the plaintiff challenged the National Republican Party's formula for allocating delegates among the states. *Ripon*, 525 F.2d at 570. The lack of a severe burden was obvious. Indeed, the plaintiff could not even "identify with any confidence the set of people whose preferences are to be given equal and accurate expression." *Id.* at 585 n.58. For that reason, the plurality considered whether the scheme rationally advanced a legitimate interest. *Id.* at 586-87. The plurality also disclaimed any *per se* rule, stating that its decision "might be otherwise in a case where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast." *Id.* at 589. Indeed, the plurality explained, "although courts should be slow to interfere with the internal processes of political parties, circumstances can be conceived of wherein they may grant relief." *Id.*. The plurality also distinguished between the internal procedural rules at issue in that case and a burden "mandated by a state statute, applicable to all parties." *Id.* at 589 n.65. The Second Circuit thus correctly distinguished *Ripon*, explaining:

> the convention system considered in *Ripon* was, by and large, a private function that directly implicated the party's right to govern its own internal affairs. By contrast, New York's delegate selection process is one of public election, which directly implicates the associational rights of party members voters and candidates.

Pet. App. 51a-52a (citations omitted).

Petitioners' reliance on *Ripon* and *Bachur* is, accordingly, doubly misplaced. Both involved challenges to the internal rules of the national political parties, not challenges to burdens imposed by statute. And both concerned restrictions that did not block a single candidate from appealing to the voters of his or her party. Neither case stands for the proposition that a State may rely on the associational interests of the party leadership to justify severe burdens, imposed by law, that effectively shut out

voters of the party from the nominating process. Neither case conflicts with the Second Circuit's analysis of New York's unique and extreme statutory scheme.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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